LIBRARY
SUPREME COURT, U. S.

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 899 J

PEOPLE JOHN DOE, Petitioner,

vs.

STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
First Appellate District

EDWARD ATTORNEY,
Address Here,
San Francisco, California 94111,
ELIZABETH W. TYPEWRITE,
Address Here,
San Francisco, California 94111,
Attorneys for Petitioner.



Subject Index

	Page
Opinion below	2
Jurisdiction	2
Statement of questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	4
A. Proceedings below and presentation of federal questions	4
B. Allegations in the affidavit in support of the application for the search warrant	8
C. Evidence seized	12
Reasons for granting the writ	12
I. Whether the allegations in the affidavit in support of the application for a search warrant were sufficiently timely to justify the issuance of the warrant is a federal question of substance not previously decided by this court	12
II. The use in the affidavit of portions of a taped telephone conversation is not in accord with applicable decisions of this court	15
III. Whether police can obtain records of telephone calls from the files of the telephone company without a court order is a federal question of substance that previously has not been decided by this court	17
IV. The ruling of the California courts that the allegations in the affidavit in support of the application for the search warrant were sufficient is not in accord with applicable decisions of this court	18
Conclusion	19

Table of Authorities Cited

Cases	Pages
Aguilar v. Texas, 378 U.S. 108 (1964)	18
Durham v. United States, 403 F.2d 190 (9th Cir. 1968)	12, 13
Di Piazza v. United States, 415 F.2d 89 (6th Cir. 1969)	18
Katz v. United States, 389 U.S. 347 (1967)	16, 17
Nolan v. United States, 423 F.2d 1031 (10th Cir. 1970)	18
People v. Nelson, 171 C.A.2d 356, 340 P.2d 718 (1959)	13
Schoenman v. United States, 317 F.2d 173 (D.C. Cir. 1963)	13
Sgro v. United States, 287 U.S. 206 (1932)	13
Spinelli v. United States, 393 U.S. 410 (1969)	18
United States v. Covello, 410 F.2d 536 (2d Cir. 1969)	18
United States v. White, 405 F.2d 838 (1969)	16

Codes	
California Penal Code:	
Section 337a	5
Section 337a(1)	1, 4, 6
Section 995	4, 5, 7
Section 1238	7
Section 1466	7
Section 1538.5	4, 5
Section 1538.5(m)	6, 7

Constitutions	
United States Constitution:	
Fourth Amendment	3, 8, 17
Fourteenth Amendment	4, 8, 17

Statutes	
28 U.S.C. Sec. 1257(3)	2
Act of June 15, 1917, Title XI	13
100 A.L.R. 2d 525, 534-42 (1965)	13

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

PETER JOHN RICCI, *Petitioner*

vs.

STATE OF CALIFORNIA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
First Appellate District

The petitioner Peter John Ricci respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California for the First Appellate District, affirming the judgment of sentence and order granting probation of the Superior Court of the State of California for the County of San Mateo, entered after the petitioner had entered a plea of guilty to willfully, unlawfully, and feloniously engaging in bookmaking in violation of section 337a, Subd. 1 of the California Penal Code.

OPINION BELOW

The opinion of the Court of Appeal of the State of California for the First Appellate District, certified not to be published in official reports, is set forth as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeal of the State of California for the First Appellate District was entered on July 28, 1970. On September 1, 1970, petitioner filed a Petition for Hearing in the Supreme Court of the State of California. On September 24, 1970, the Supreme Court of the State of California denied the petition, and this petition for a writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATEMENT OF QUESTIONS PRESENTED

1. Is the information in an affidavit in support of the application for a search warrant sufficiently current to justify the issuance of a warrant when there was no allegation of any evidence obtained less than 43 days prior to the application to support an inference that any instrumentalities or fruits of unlawful gambling activity were located on the premises to be searched, and there was no allegation of any illegal

conduct by the owner of the premises that occurred less than 26 days prior to the application?

2. Can an affidavit in support of an application for a search warrant refer to a taped telephone conversation for the purpose of voice identification made of the defendant, without his consent, when the tape is used to authenticate other evidence?

3. Can an affidavit in support of an application for a search warrant refer to records of telephone calls placed by an individual when the records were removed from the files of the Pacific Telephone and Telegraph Company by police officers without a warrant or other Court order?

4. Can a search warrant issue upon allegations of mere innocent movement by the suspect, the possession of two telephones in his residence, bald police suspicion, and inadequate informants' tips?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved:

1. United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. United States Constitution, Amendment XIV, §1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

3. California Penal Code §1538.5

The full text of this section is set forth in Appendix "B".

STATEMENT OF THE CASE

A. Proceedings Below and Presentation of Federal Questions.

After petitioner's motion to suppress evidence under §1538.5 of the California Penal Code was denied by the magistrate who issued the search warrant, and after petitioner's motion to set aside the information under §995 of the California Penal Code on the ground of the inadmissibility of the evidence was denied by the trial court, the petitioner entered a plea of guilty to one count of bookmaking in violation of §337a, Subd. 1 of the California Penal Code before the Honorable Allison M. Rouse in the Superior Court of the State of California for the County of San Mateo.

On December 28, 1968, the petitioner was arrested at his home at 1086 Skyline Drive, Daly City, Cali-

fornia, by officers of the Daly City Police Department and was charged with bookmaking. (C.T. 25.)[1] On March 7, 1969, the preliminary examination was held in the Municipal Court for the Northern Judicial District of the County of San Mateo, State of California, before the Honorable Paul M. Hupf, at which time defense counsel moved under §1538.5 of the California Penal Code to suppress the evidence seized pursuant to a search warrant at the time of the petitioner's arrest. The motion to suppress was denied and the magistrate held the petitioner to answer on the charges. (C.T. 5, 7, 24-25, 77.) At the preliminary examination the petitioner did not raise any of the points sought to be reviewed by this Court.

On March 21, 1969, an information was filed in the Superior Court of the State of California for the County of San Mateo, charging the petitioner with five counts of illegal gambling activity in violation of various portions of California Penal Code §337a. On April 3, 1969, the petitioner moved to set aside the information under §995 of the California Penal Code. (C.T. 80.) In his Memorandum in Support of Motion to Set Aside Indictment [sic] under Penal Code §995, the petitioner objected to the use in the affidavit in support of the application for the search warrant of the fruits of the taped telephone conversation between the police officer and the petitioner (Question 2 herein). (C.T. 90.) On May 1, 1969, the motion was denied by the Honorable Allison M. Rouse. (C.T. 94.)

---

[1]The Clerk's Transcript on Appeal will be herein designated as "C.T."

On May 16, 1969, the petitioner filed a Petition for Writ of Mandate and Writ of Prohibition in the Court of Appeal for the State of California for the First Appellate District, Division Four. On August 1, 1969, the petition was denied. The petitioner petitioned for a hearing to the Supreme Court of California, and on August 27, 1969, the Supreme Court of California denied a hearing.

On September 29, 1969, the petitioner moved to withdraw his plea of not guilty and to substitute a plea of guilty to count I of the information, charging that from on or about January 1, 1968, through December 29, 1968, the petitioner did "willfully, unlawfully and feloniously engage in bookmaking" in violation of §337a, Subd. 1 of the California Penal Code. (C.T. 97.)

On November 6, 1969, the trial court ordered that the petitioner be granted five years' probation on the condition that he serve six months in the county jail, with four months' county jail time suspended, on the condition that the defendant pay a fine in the sum of $2,500.00, plus the statutory penalty assessment. (C.T. 102-103.)

On November 13, 1969, the petitioner, through his present counsel, filed his Notice of Appeal to the Court of Appeal of the State of California for the First Appellate District. (R.T. 110.) Under §1538.5(m) of the California Penal Code an individual may appeal from a judgment of conviction based upon a plea of guilty if at some stage of the proceed-

ings prior to the entry of the plea the individual has moved to suppress the evidence.[2]

In his opening brief in the Court of Appeal, the petitioner contended that the information alleged in the affidavit in support of the application for the search warrant was not sufficiently current to justify the issuance of the warrant. (Question 1 herein) (Appellant's Opening Brief, pp. 24-29.) The Court of Appeal rejected the petitioner's contention without extended discussion. (Appendix "A", p. iii.)

After obtaining leave of the Court of Appeal during oral argument, petitioner filed in the form of a letter a supplemental brief with the Court of Appeal, attacking that portion of the affidavit which relied upon the taped telephone conversation of the petitioner for voice identification. (Question 2 herein.) The Court of Appeal did not pass upon this federal question in its opinion.

In his opening brief in the Court of Appeal, petitioner attacked that portion of the affidavit which

---

[2]The full text of §1538.5(m) reads as follows:

(m) **Exclusive pre-trial remedy; review on appeal after conviction.** The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

referred to the information obtained from the telephone company on the ground that as to these records the petitioner had a reasonable expectation of privacy within the protection of the Fourth and Fourteenth Amendments to the United States Constitution. (Question 3 herein.) (Appellant's Opening Brief, pp. 13-14.) The Court of Appeal did not expressly pass upon this federal question in its opinion. The Court of Appeal concluded, however, that the petitioner had waived the independent state ground of objection to this evidence by failing to raise it in the trial court.

Upon application of the petitioner's counsel, the Honorable Allison M. Rouse ordered that the portion of the order of probation, requiring the defendant to serve six months in the county jail with four months being suspended on the condition that the petitioner pay a fine, be suspended for 90 days until February 17, 1970, at 5:00 p.m. pending petitioner's appeal. (R.T. 101.) The execution of that portion of the sentence is still being suspended, pending this Court's ruling on the petition herein.

B. Allegations in the Affidavit in Support of the Application for the Search Warrant.

On December 27, 1968, Captain Richard Sims of the Daly City Police Department obtained a search warrant for the search of the premises located at 1086 Skyline Drive, Daly City, California, and a 1967 Chevrolet convertible, California license VPZ 482. (A.C.T. pp. 15-17.)[2]

---

[2]The Augmented Clerk's Transcript on Appeal will be herein designated as "A.C.T."

The search warrant was obtained upon the following allegations:

In November of 1967, Captain Sims observed the petitioner leaving a Daly City cigar store with a Daily Racing Form. (A.C.T. 4.)

On January 23, 1968, the petitioner was observed leaving his house, driving over several blocks in a circle, and returning home without stopping and following the same route upon leaving. (A.C.T. 5.)

On January 24, July 2, July 3, December 5, and December 9, 1968, the petitioner was observed driving to the Harding Park Golf Course in San Francisco, where on all but the last occasion he was observed entering only the building where a restaurant is located. (A.C.T. 5-6.)

On July 2, 1968, the petitioner was seen driving to Skyline Plaza, Daly City, a shopping center. On July 3, 1968, the petitioner was seen driving to the Fairmont Shopping Center, Pacifica. On December 4, 1968, the petitioner was observed driving to the Fairmont Shopping Center where he made at least two telephone calls from a public telephone booth. On December 5, 1968, the petitioner was observed driving to a Shell Station at Westmore and Skyline Drive, Daly City, where he made a telephone call from a public telephone booth before returning home at 11:30 a.m. At 12:30 p.m. on December 5, the petitioner left his home in his automobile. (A.C.T. 5-6.)

In December of 1967, Inspector Ralph Brown of the San Francisco Police Department Intelligence Detail advised Captain Sims that a Mrs. Charles

Teran had told Inspector Brown in 1965 that the petitioner was handling the bookmaking business previously operated by Mrs. Teran's husband, while Mrs. Teran's husband was in prison. (A.C.T. 4-5.)

On June 23, 1968, Inspector Daniel Nilan of the San Francisco Police Department had told Captain Sims that the petitioner's name and telephone number "had come up" in a recent bookmaking arrest in San Francisco. (A.C.T. 7.)

On June 18, 1968, Inspector Nilan had seized certain tape recordings from the apartment of one Henry St. Pierre in San Francisco. Mr. St. Pierre ultimately pleaded guilty to bookmaking. These tapes contained approximately 10 to 15 telephone conversations between Mr. St. Pierre and an individual known as "Pete". During these calls, "Pete" gave Mr. St. Pierre odds and obtained from Mr. St. Pierre information about bets and pay-offs made by unknown bettors. During one of the conversations, "Pete" complained to Mr. St. Pierre that he had been "past-posted"—a term referring to accepting a bet after a sporting event had been commenced. (A.C.T. 7-8.) On December 20, 1968, Sgt. Stables of the Daly City Police Department called the petitioner at a telephone number listed to the petitioner and a conversation between these two was taped. After comparing the voices on the tapes, Captain Sims concluded that the same person was the speaker in both instances. (A.C.T. 8-9.)

On November 6, 1968, the Daly City Police Department received an anonymous dymo-tape giving

the petitioner's name, street of residence, and telephone number and alleging that the petitioner was a "bum pay bookie," who took bets on horse races and, with another individual, pushed football cards in the Bay Area. (A.C.T. 6-7.) On November 20, 1968, another written communication was sent to the District Attorney of San Mateo County from the same anonymous individual, again charging the petitioner with being a bookie. (A.C.T. Exhibit "A".)

On December 1, 1968, another written communication was sent to the District Attorney for San Mateo County, charging the petitioner with being a bookie. (A.C.T. Exhibit "B".)

There were two telephones in the petitioner's house: one listed to the petitioner and the other to a female with the same surname. (A.C.T. 7.)

At some unknown date, police officers obtained records from the Pacific Telephone & Telegraph Company, indicating all of the toll calls made between April 28, 1968, and November 14, 1968, from a telephone listed to the petitioner. Similar records were obtained showing all toll calls between October 27, 1968 and November 3, 1968, from a telephone listed to one Richard Kourmarian, an individual detained for questioning by the San Francisco Police during a bookmaking investigation. From these records, it appeared that the petitioner had made thirteen calls to Mr. Kourmarian and twenty-two to Kathleen Alden, publishers in North Hollywood, California, allegedly a sporting house which furnishes results of all sporting events. The records of Mr. Kourmarian

showed that he had made five calls to the petitioner. (A.C.T. 10.)

C. Evidence Seized.

When the Daly City Police Officers searched the petitioner's home at 1086 Skyline Drive, Daly City, on December 28, 1968, they seized football tickets (People's Exhibit 1), a copy of the Weekend Sports Journal, referring to college and professional football bowl games (People's Exhibit 2), certain notebooks (People's Exhibit 3), and papers with writing and printing (People's Exhibit 4). (C.T. 26-28.)

Sgt. James A. Mullen, the individual in charge of the gambling detail in the Bureau of Special Services of the San Francisco Police Department, testified that the various items seized at the petitioner's premises comprised gambling paraphernalia. (C.T. 59-67.)

REASONS FOR GRANTING THE WRIT

I. WHETHER THE ALLEGATIONS IN THE AFFIDAVIT IN SUPPORT OF THE APPLICATION FOR A SEARCH WARRANT WERE SUFFICIENTLY TIMELY TO JUSTIFY THE ISSUANCE OF THE WARRANT IS A FEDERAL QUESTION OF SUBSTANCE NOT PREVIOUSLY DECIDED BY THIS COURT.

In testing the validity of search warrants, courts have been concerned with the currency of the allegations in the supporting affidavit that contraband or the instrumentalities of illegal conduct are located in the premises to be searched, because if the evidence has been removed in the interim, an unnecessary invasion of privacy may result. See e.g., *Durham v.*

United States, 403 F.2d 190 (9th Cir. 1968); *Schoeman v. United States*, 317 F.2d 173 (D.C. Cir. 1963).

In *Sgro v. United States*, 287 U.S. 206 (1932), this Court ruled upon the timeliness of the allegations in an affidavit in support of an application for a search warrant. That case, however, was based to some degree upon the interpretation of the Act of June 15, 1917, Title XI, the statute governing the time within which warrants must be served. Since *Sgro*, this Court has not dealt with the issue of whether the "staleness" of the evidence alleged in support of the issuance of a warrant makes the search "unreasonable" within the purview of the Fourth and Fourteenth Amendments.

Although a considerable number of federal and state courts have passed upon the issue of timeliness, see Annot., 100 A.L.R.2d 525, 534-42 (1965), little effort has been made to articulate the standards underlying the respective decisions, and the rationale of the "rule-of-thumb" that an interval of 20 days is acceptable, but thirty 30 days is too long is somewhat obscure. See *People v. Nelson*, 171 C.A.2d 356, 359-60, 340 P.2d 718, 721 (1959).) Moreover, the cases do not deal with the critical distinction between allegations of illegal conduct by the suspect and allegations that the fruits or instrumentalities of the illegal conduct are located on the premises to be searched.

As the issue was finally presented at oral argument, the petitioner contended that the allegations in the affidavit in support of the application for the search warrant were too "stale" to support the issuance of

the warrant, because the most current allegations from which an inference could be drawn either that unlawful activity was being conducted *on the premises searched* or that the fruits or instrumentalities of unlawful activity were located on the premises dated back at least 43 days prior to the issuance of the warrant.

In this case, although there was evidence as of December 1, 1969 *(26 days* prior to the application for the warrant) from which the inference could be drawn that the petitioner was engaged in bookmaking activity—namely, a letter from an anonymous informer, there was nothing in that communication that indicated that the illegal activity or evidence relating thereto was located at the petitioner's home. (A.C.T. Exhibit "B".) The last information that activity was conducted at the petitioner's home came from the telephone company's records which showed that sometime on or about November 14, 1969 (*43 days* prior to the application) the petitioner had made the telephone calls that indicated some bookmaking activity. (A.C.T. 10.) Thus, it was unreasonable for the magistrate to conclude that the allegations in the affidavit were sufficiently current to support the inference that the objects sought were located in the premises.

It is submitted that the critical factor in determining the staleness of allegations should be not the last date of any illegal activity, but rather the last date of any information giving rise to probable cause to believe either that illegal activity or the fruits thereof

were *located on the premises to be searched.* In this regard, the timeliness and the nature of the allegations in support of a search warrant application differ from those in support of an arrest warrant application. In deciding whether to issue an arrest warrant, the magistrate is concerned only with whether there was probable cause to believe that the suspect committed the offense. In issuing a search warrant, however, the magistrate must consider not merely whether the suspect probably was guilty of illegal activity, but whether evidence of that activity is located on the designated premises.

Certainly, since the question of "staleness" is presented in every application for a search warrant, this Court should articulate more definite standards than now exist.

II. THE USE IN THE AFFIDAVIT OF POSITIONS OF A TAPED TELEPHONE CONVERSATION IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

Some of the most damaging evidence asserted against the petitioner in the affidavit in support of the search warrant application was taken from tapes of alleged telephone conversations between one Henry St. Pierre and the petitioner, seized at Mr. St. Pierre's apartment. These tapes indicated that the "Pete" with whom Mr. St. Pierre conversed was engaged in illegal bookmaking activity. (A.C.T. 7-8.) Although the police were not responsible for recording the St. Pierre tapes, the "Pete" in the tapes could not have been identified as being the petitioner without the use of a taped telephone conversation between

the petitioner and Sgt. Stables of the Daly City Police Department made on December 20, 1968, several days before the petitioner's arrest. Captain Sims, who signed the affidavit in support of the application for the search warrant, alleged that after listening to the St. Pierre tapes and the telephone conversation between Sgt. Stables and petitioner, Captain Sims concluded that the petitioner and the "Pete" in the tapes were one and the same. (A.C.T. 8-9.)

In *Katz v. United States*, 389 U.S. 347 (1967), this Court outlawed the use of evidence obtained by wiretapping. It is submitted that although this case differs factually from *Katz*, the doctrine established in *Katz*—namely, that whenever an individual is in a place in which he has a reasonable expectation of privacy against government intrusion, the use of electronic equipment to obtain evidence against him in the absence of a Court order is impermissible—should be applicable to the petitioner. The mere fact that the taped telephone conversation was used merely for voice identification does not eliminate the fact that the evidence was obtained through the use of electronic eavesdropping.

The issue presented here is similar to that in *United States v. White*, 405 F.2d 838 (1969), *cert. granted*, 394 U.S. 957 (1969), now pending before this Court, involving the analogous question of the admissibility of evidence obtained by use of an electronic transmittor planted on a government informer.

This Court should grant certiorari in this case to clarify whether *Katz* is to be given a broad applica-

tion, preventing the use of *all* evidence obtained through electronic eavesdropping without a Court order, or whether *Katz* is to be limited to the use of the substance of the overheard conversation or to the overhearing of telephone conversations without the consent of either of the parties thereto.

III. WHETHER POLICE CAN OBTAIN RECORDS OF TELEPHONE CALLS FROM THE FILES OF THE TELEPHONE COMPANY WITHOUT A COURT ORDER IS A FEDERAL QUESTION OF SUBSTANCE THAT PREVIOUSLY HAS NOT BEEN DECIDED BY THIS COURT.

The affidavit in support of the application for the search warrant relied in great part upon certain records obtained by the police from the Pacific Telephone and Telegraph Company without a warrant or other court order which indicated that the petitioner had numerous telephone conversations with a known gambler and with a sporting information house in Los Angeles. (A.C.T. 10-11.)

As was indicated above, *Katz v. United States*, 389 U.S. 347 (1967), established the doctrine that the Fourth and Fourteenth Amendments protect an individual's reasonable expectation of privacy. Certainly, an individual would have no greater desire to expose to the prying eyes of the police the names of the individuals with whom he carries on telephone conversations than he might have to expose the contents of the conversations themselves. This issue is another one which should be decided by this Court in order to determine the extent of the application of *Katz*.

The use of telephone company records by police is sufficiently widespread to have been attacked unsuccessfully in several appellate cases. See e.g., *Nolan v. United States*, 423 F.2d 1031 (10th Cir. 1970); *Di Piazza v. United States*, 415 F.2d 99 (6th Cir. 1969), petition for cert. filed, 38 U.S.L.W. 3342 (U.S. Dec. 17, 1969); *United States v. Covello*, 410 F.2d 536 (2d Cir. 1969), cert. denied 397 U.S. 879 (1969), rehearing denied 397 U.S. 929 (1970). Because of the apparent prevalence of this police conduct, this Court should pass upon the issue presented.

IV. THE RULING OF THE CALIFORNIA COURTS THAT THE ALLEGATIONS IN THE AFFIDAVIT IN SUPPORT OF THE APPLICATION FOR THE SEARCH WARRANT WERE SUFFICIENT IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

It was submitted above that the magistrate should not have considered the allegations in the affidavit derived by use of the taped telephone conversation and from the records removed from the files of the Pacific Telephone and Telegraph Company. In the absence of these allegations, the remaining allegations in the affidavit were insufficient to satisfy the two-pronged test set forth in *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964).

Capsulized, these allegations consisted of police surveillance of the petitioner on one occasion as he bought a racing form in a cigar store and on several other occasions as he drove from his home to a mu-

nicipal golf course and shopping centers and placed telephone calls from public telephone booths; two telephone listings at the petitioner's home, one in the name of a female; the "bald and unilluminating" assertion that the petitioner's name and telephone number "had come up" during a recent bookmaking arrest; the unsupported statement of a bookmaker's wife, made three years before the arrest; and the statements of two anonymous informers bereft of underlying factual information establishing the personal knowledge of the informants, or their reliability. (A.C.T. 4-9, Exhibits "A" and "B".)

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California for the First Appellate District.

Dated, San Francisco, California,
October 21, 1970.

Respectfully submitted,
EPHRIAM MARGOLIN,
HERBERT W. YANOWITZ,
Attorneys for Petitioner.

(Appendices "A" and "B" Follow)

Appendix "A"

Not to Be Published in Official Reports

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

---

1 Criminal No. 8459

People of the State of California,
Plaintiff and Respondent,

vs.

Peter John Ricci,
Defendant and Appellant.

Defendant-appellant claims that the recordings of telephone conversations with St. Pierre were not admissible as evidence (Pen. Code §632, subd. d) and thus could not be considered by the magistrate in determining whether to issue the search warrant under which bookmaking records and paraphernalia were found in appellant's home. We assume, without deciding, that the ex parte application for the warrant is a "judicial * * * proceeding" within the meaning of subdivision (d).

It seems apparent that no "eavesdropping" was done by police. Rather, St. Pierre himself made the recordings. Their volume and frequency would seem to indicate a fixed policy by him, in his business as a "layoff bookie," to make such recordings as a means of indisputable accounting with his several customers. Thus it may reasonably be inferred that his customers knew of, and consented to, his recording of their conversations. While the parties doubtless desired to avoid public knowledge of the conversations, it could well be argued that they did "reasonably expect that the communication may be * * * recorded" (Pen. Code §632, subd. c), thus removing the prohibition of section 632. No impropriety in police seizure of St. Pierre's recordings is even remotely suggested. Thus it could well follow that section 632 does not bar their use.

We need not reach these problems or the apparent contradiction in the 1967 statute (see third paragraph of Pen. Code §630), however. Even if it be assumed that the St. Pierre recordings and that of appellant's voice made by police could not be looked to by the magistrate, we feel that the remaining allegations of the affidavit adequately support issuance of the search warrant.

The telephone company records showed appellant's frequent calls to numbers known, through San Francisco police, to be those of bookmakers. No objection to use of these records was made at the §1538.5 proceeding in the trial court, nor was the issue raised in the petition to another division of this court for

prohibition (1 Civil No. 26869). Thus the issue was waived, and need not be considered on this appeal (see People v. Groves, 71 A. C. 1239, 1241; People v. Santiago, 71 A.C. 18, 23). These records, plus the factual allegations of the affidavit and the expert's opinion stated therein, amply support issuance of the warrant. The sum of these allegations readily distinguishes this affidavit from that held insufficient in a case principally relied upon by appellant (Spinelli v. United States, 393 U. S. 410).

The affidavit for the warrant states the facts of a long-continued investigation. While some of the information may be "stale", the culminating discoveries which completed the case for the warrant were current within the rule as we understand it. The slight delay thereafter in seeking the warrant was insufficient to bar issuance.

Judgment affirmed.

Certified for Nonpublication.

Draper, P. J.

We concur:

Brown (H.C.), J.

Caldecott, J.

Filed July 28, 1970,
Lawrence R. Elkington, Clerk.

Appendix "B"

§ 1538.5 Motion to return property or suppress evidence

(a) Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that:

(1) The search or seizure without a warrant was unreasonable; or

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) First hearing. When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Evidence. Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) Effect of granting motion. If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) Return of property. If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) Felony; motion at preliminary hearing. If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) Misdemeanor; pre-trial motion at special hearing. If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) Motion at trial. If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court. Furthermore, the court in its discretion may entertain the motion during the course of the trial.

(i) Felony; renewal of motion at special hearing; review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special

hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) Relitigation of question after grant of motion; new evidence, review. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hear-

ing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o) of this section, unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) Release of defendant pending resumption of proceedings in trial court. If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j) or the people file a petition for writ

of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such petition, the defendant shall be released if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

(l) Stay; time for trial; dismissal; continuance; bail or release. The trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of the State of California of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o) of this section, the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and

needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) Exclusive pre-trial remedy; review on appeal after conviction. The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validty of a search or seizure on appeal from a conviction in a criminal case nothwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Motions on other grounds; existing law and procedure. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the federal and

state constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) People's petition for mandate or prohibition: notice of intention. Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.